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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 73.202(b),) MB Docket No. 02-352
 Table of Allotments,) RM-10602
 FM Broadcast Stations)
 (Glenville, North Carolina))
)

To: Assistant Chief, Audio Division
 Media Bureau

REPLY

The Stair Company ("Stair"), licensee of Station WCTU(FM), Channel 290A, Tazewell, Tennessee, by its counsel, hereby submits its reply to the "Reply Comments" of Georgia-Carolina Radiocasting Company, LLC ("GCRC").¹ This reply is accompanied by a separate motion for its acceptance. GCRC's Reply Comments are based on assumptions and speculations rather than any factual basis. As Stair will show, those assumptions and speculations are wrong.

1. Stair filed a timely counterproposal in this proceeding, seeking to relocate Station WCTU from Tazewell to Weaverville, North Carolina on Channel 290C2. That counterproposal conflicts with the proposal set forth in the *Notice of Proposed Rule Making ("NPRM")* (DA 02-3066, released November 8, 2002), to allot Channel 289A to Glenville, North Carolina. Before filing its counterproposal, Stair filed a minor modification application for Station WCTU, seeking to relocate its transmitter site on Channel 290A (File No. BPH-20021210AAP).

2. GCRC argues that Stair's counterproposal is defective because of the pendency of the minor modification application. GCRC rests its argument on the Commission's policy not to accept alternative proposals in rule making proceedings, citing *Winslow, Camp Verde, Mayer*

¹ GCRC also filed a counterproposal in this proceeding. This Reply on behalf of Stair does not address the merits of the GCRC counterproposal. Stair will comment on that counterproposal following the issuance of a Public Notice providing a reply period.

and *Sun City West, Arizona*, 16 FCC Rcd 9551 (2001). Specifically, GCRC describes the minor modification application as a counterproposal to the Glenville proposal and characterizes Stair's Filings as "alternative" counterproposals. As will be shown, this argument is entirely without foundation. Accordingly, **there** is no defect in Stair's **counterproposal**, and it should be placed on public notice in **due** course.

3. The Commission prohibits a rule making proponent from advancing one or more alternative proposals in a single proceeding. *Winslow, supra*. The reasons for this policy are (1) the Commission **must** choose between the alternatives, and its choice can be second-guessed by the rule making proponent **after** the fact; (2) an alternative proposal is essentially a contingent proposal for rule making (*e.g.*, if X cannot be granted, then grant Y), and contingent proposals are not permitted **because** they are not conducive to the orderly administration of the **Commission's** processes. *Id.*

4. The *Winslow* policy is inapplicable here because the application is not a counterproposal, an alternative proposal, or a contingent proposal. The application is not a counterproposal because it is **not** in conflict with the Glenville proposal as set forth in the *NPRM*. Nor was it in conflict with any other filing when it was submitted. See Exhibit 1. Nor has Stair advanced alternative rule making proposals, since neither the Commission nor Stair is put to a choice whether to pursue the application or the rule making proposal. Indeed, contrary to GCRC's suggestion that **one of these** proposed modifications will not be built, if Stair's application is **granted**, it **intends** to construct new facilities as authorized. If its rule making proposal is granted in **due** course, it will **file** another application for Channel 290C2 at Weaverville. Finally, there is no contingent relationship between the application and the rule making proposal, since **either one** can be processed, granted, and effectuated independently of the other.

5. Stair has simply applied for a new transmitter site from which it can continue to serve Tazewell on its current channel. which can be granted and implemented in the near term, and also filed a rule making proposal to serve a new community of license on a higher-class channel, which will bring further improvements in the long term. The *Winslow* policy simply does not prohibit a party from filing a rule making proposal while it has a minor modification application on file, as Stair has done.

6. GCRC speculates that Stair's application "was filed with the sole purpose of blocking a wide range of other proposals in this proceeding." CCRC Reply at 4. Stair disagrees with GCRC's speculation on this score, and has filed a separate pleading defending the bona fides of its application (a copy is attached). In that pleading, Stair's engineer describes the poor condition of the existing tower and confirms that plans to relocate were under way for some time. GCRC is essentially arguing that the Commission adopt a policy that would prohibit the filing of applications that limit the choices available to potential rule making proponents. This would be a bad policy. There are legitimate reasons for filing applications either before or after a rule making proposal is filed. The attached "Opposition to Informal Objection" describes the valid reasons Stair had for filing its application. If GCRC now finds its choices limited, it should have heeded the Commission's advice on this subject. The Commission has warned parties intending to file rule making proposals not to wait until the last day of a rule making comment period. Rather, by filing as early as possible, the proponent can gain protection against later filed applications or rule making proposals by third parties. *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743, 4745 (1993).

7. As discussed above, the Commission permits a licensee to pursue changes to its facilities while it has a rule making proposal pending involving the same station. It should not change this policy. Rule making proposals invariably take the Commission longer to decide than

applications, if for no other reason than because of the additional procedures mandated by the Administrative Procedure Act for agency rule making proceedings. While a rule making can take years to complete, an application can often be processed and granted in a matter of months. Therefore, if a licensee's transmitter site location has become unavailable, or if its signal could be improved through a modification to its facilities, it is reasonable for the licensee to develop a long-term plan which can be implemented through a rule making and at the same time pursue a short-term improvement by application. This procedure furthers the public interest by permitting rapid improvements to radio reception in the near term and optimizing spectrum allocations in the long run.

WHEREFORE, Stair's counterproposal in this proceeding does not fall within the Commission's policy against "alternative" counterproposals, and is unrelated to, and not contingent upon, action on its pending minor modification application. The merits of the application itself are not before the Commission in this proceeding. Accordingly, the counterproposal is acceptable for filing and should be placed on public notice.

Respectfully submitted,

THE STAIR COMPANY

A handwritten signature in black ink, appearing to read 'Mark N. Lipp', written over a horizontal line.

Mark N. Lipp
J. Thomas Nolan
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Its Counsel

February 5, 2003

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:)
)
Application of The Stair Company for Minor) File No. BPH-20021210AAP
Changes to the Licensed Facilities of)
WCTU(FM), Tazewell, Tennessee)
(Fat. ID No. 72070))
)

To: Chief, Audio Division
Media Bureau

OPPOSITION TO INFORMAL OBJECTION

The Stair Company (“Stair”), licensee of Station WCTU(FM), Channel 290A, Tazewell, Tennessee, by its counsel, hereby opposes the Informal Objection of Georgia-Carolina Radiocasting Company, LLC (“GCRC”) to the above-captioned application (the “WCTU Application”). GCRC raises three objections against the WCTU Application. GCRC claims that (1) the WCTU Application is barred by the Commission’s policy against alternative counterproposals; (2) it was not filed for bona-fide purposes; and (3) it fails to meet the Commission’s community coverage requirements. Each of these objections is addressed in turn below.

I. The WCTU Application Is Not Barred by any Policy Against Alternative Counterproposals.

1. CCRC requests that the Commission cease processing the WCTU Application because of a pending rule making proceeding, MB Docket No. 02-352 (Glenville, North Carolina). After filing the WCTU Application, Stair filed a timely counterproposal in that proceeding, seeking to upgrade and relocate WCTU from Tazewell to Weaverville, North Carolina on Channel 290C2

2. GCRC argues that the processing of the WCTU Application should be suspended pursuant to the Commission's policy not to accept alternative proposals in rule making proceedings. GCRC ~~made~~ the same argument in its reply comments in the *Glenville, North Carolina* rule making proceeding. However, as Stair pointed out in its reply filed in that proceeding, the Commission's policy is not applicable here. A copy of Stair's reply in that proceeding is attached hereto, and is incorporated herein by reference. *See Attachment 1.* In summary, as set forth therein, ~~the~~ Commission permits a licensee to pursue changes to its facilities while it has a rule making proposal pending involving the same station, and there are sound reasons for maintaining that policy. There is no statute, rule, or policy that requires suspension of processing ~~of~~ the WCTU Application. That application is separate from and not contingent with or alternative to the rule making filing.¹ Indeed, one possible outcome is that the application is granted first, and ~~the~~ rule making proposal is granted at a later date. In that case, Stair intends to construct the facilities authorized pursuant to the initial construction permit and operate the station during the interim period. Accordingly, GCRC's request for suspension should be denied.

II. The WCTU Application Was Filed For Bona-Fide Reasons, and Not Solely for the Purpose of Precluding Competing Counterproposals.

3. In its reply comments in the *Glenville, North Carolina* rule making proceeding, GCRC asserts that the WCTU Application "was filed with the sole purpose of blocking a wide range of other possible proposals" in that proceeding. GCRC Reply Comments at 4. That

¹ The policy against alternative rule making proposals referred to by GCRC in its informal objection was set forth in *Winslow, Camp Verde, Mayrr and Sun City West, Arizona*, 16 FCC Rcd 9551 (2001). As discussed in the attached reply, that policy is not applicable to the WCTU Application, which is not in conflict with the *Glenville, North Carolina* proposal or any other pending proceeding, and is not alternative to or contingent upon action in the rule making proceeding. *See Attachment 2* (channel study demonstrating clear spacing to all pending proposals).

assertion is incorrect. The attached affidavit of Frank McCoy describes the difficulties Stair is currently encountering at its present transmitter site. See Attachment 3. Recently, the Commission ordered WCTU to change frequencies from Channel 231A to 290A. *Colonial Heights, Tennessee*, 15 FCC Rcd 195 (2000). This required the installation of a much larger antenna than had previously been mounted on the tower. The new antenna severely taxes the existing tower structure, which is of lightweight construction and is in deteriorating condition.

4. The current site is not suitable for long-term capital improvements, for several reasons. Repairs to the existing structure are difficult or impossible given its condition. The tower is on unstable ground in a residential area, making new construction unwise and doubtful of local zoning approval. Finally, after changing frequencies, WCTU experienced interference from short-spaced Station WTBK, Channel 289C3, Manchester, Kentucky, and that interference can be expected to continue until a new transmitter site is found.

5. The Affidavit details the licensee's actions in preparing for and filing the WCTU Application. At approximately the same time, the counterproposal deadline in the *Glenville, North Carolina* proceeding necessitated finalizing WCTU's long-term plans for a change in community of license and facilities upgrade to Channel 290C2. Stair reiterates that should the WCTU Application be granted before its proposal for a change in community of license can be effectuated, it will construct the authorized facilities.

III. The WCTU Application Provides Substantial Coverage of the community of License.

6. Although the WCTU Application places a 70 dBu contour over less than 80% of the area of Tazewell, Tennessee, the contour covers 94% of the population of Tazewell. This satisfies the Commission's requirement of "substantial coverage" of the community of license. See *Certain Minor Changes in Broadcast Facilities*, 12 FCC Rcd 12371, 12380 (1907)

(minimum community coverage requirement is “at least **8070** of the area or population within the legal boundaries of the community of license”). *See also Las Vegas, Nevada*, 62 FCC 2d 586 (1977) (granting application with less than full coverage when that portion of the community excluded from 70 dBu contour was relatively unpopulated). The application will be amended to clarify that the amount of community population covered by the 70 dBu signal is the standard under which substantial compliance with the principal community coverage rule is demonstrated.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should deny the informal objection of GCRC to the above-captioned application.

Respectfully submitted,

THE STAIR COMPANY

By: _____
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(202) 783-8400

Its Counsel

February 5, 2003

ATTACHMENT 1

Reply of Stair Company in MB Docket No. 02-352

ATTACHMENT 2

Channel Study for WCTU, Tazewell, Tennessee

12-05-2002

Frank McCoy

PAGE 1

FM Study for: WCTU

FCC Database Date: 11/15/2002 36-18-25

Location: TAZEWELL, TN

Channel Class: A 83-31-19

[*] by HAAT indicates calculated as missing in database.

Call City, State

Chan Class Freq kW Latitude Dist. Required

Status Proponent

File Number HAAT Longitude Azm. Clear (km)

>>>>>>> Study For Channel 290 105.9 mHz <<<<<<<<

WCTU	TAZEWELL, TN	290 A	105.9 2.75	36-27-32	17.8	115	
LIC	Fac. No. 72070	BMLH-20010420AAS	150	83-35-07	341.4	-97.2	SHORT
WHAY	WHITLEY CITY, KY	290 A	105.9 3.00	36-44-39	98.3	115	
LIC	Fac. No. 67124	BLH-19920702KD	100	84-28-37	299.8	-16.7	SHORT
Note: WHAY changed to 252a IN Docket 93-28.							
WJDT	ROGERSVILLE, TN	293 A	106.5 .3004	36-22-51	31.80	31	73.215
LIC	Fac. No. 7950	BLH-19901116KB	420	83-10-47	75.0	+0.80	CLOSE
WTBK	MANCHESTER, KY	289 C3	105.7 5.00	37-08-59	95.8	89	73.215
CP	Fac. No. 39774	BPH-19980311IB	142	83-45-08	347.7	+6.8	CLOSE
ALLOC	OLIVER SPRINGS, TN	291 A	106.1	36-05-12	79.0	72	
VAC		RM-10193	0	84-21-25	252.2	+7.0	CLOSE
WRIL	PINEVILLE, KY	292 A	106.3 1.05	36-45-15	52.3	31	
LIC	Fac. No. 52625	BLH-19960111KO	234	83-42-23	341.6	+21.3	CLEAR
WTBK	MANCHESTER, KY	289 A	105.7 3.10	37-08-57	95.7	72	
LIC	Fac. No. 39174	BMLH-19901228KF	140	83-45-09	347.6	+23.7	CLEAR
WSWVFM	PENNINGTON GAP, VA	288 A	105.5 3.50	36-44-02	63.9	31	
LIC	Fac. No. 36894	BMLH-19900126KB	84	83-02-34	42.0	+32.9	CLEAR
ALLOC	PIGEON FORGE, TN	292 A	106.3	35-43-33	64.5	31	
VAC		RM-9989	0	83-31-18	180.0	+33.5	CLEAR
WSEVFM	GATLINBURG, TN	288 A	105.5 .530	35-42-13	67.1	31	
LIC	Fac. No. 17059	BLH-19911206KC	322	83-33-57	183.4	+36.1	CLEAR

ATTACHMENT 3

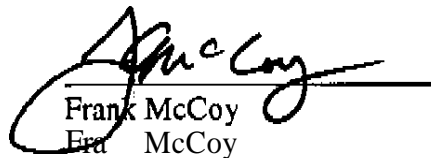
Affidavit of **Frank** McCoy

AFFIDAVIT


I, Frank McCoy, with personal knowledge of the facts set forth herein, hereby declare as follows:

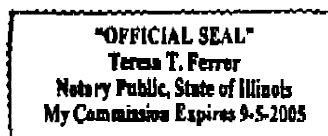
1. The antenna tower used by Station WCTU(FM) for its main transmitter is very old, corroded in places, and is of lightweight construction. The guying system for the tower appears to be eroding. Rohn Tower, the manufacturer of the steel tower material, has supplied a sign, posted on the base fence, which warns that the tower may not support the weight of a man. The tower does not appear safe to climb. Thus, any future guy replacement will be difficult or impossible.
2. When WCTU changed frequency in 2000 as a result of the Order in Docket 93-28, a new antenna was installed that is considerably larger than the antenna that was previously mounted on the tower, exacerbating the tower's structural problems.
3. WCTU is short spaced to Station WTBK, Channel 28.9C3, Manchester, Kentucky as a result of the application filed to implement the Order in Docket 93-28 and WTBK's construction pursuant to its authorization, FCC File No. BPH-199803111B. WCTU has experienced interference arising from that short spacing.
4. Because of the factors described above, WCTU personnel conducted a search for land upon which a new tower could be constructed. Early on, it was determined that community coverage would be an issue, and that to obtain the best site an application would have to rely on a supplemental showing pursuant to the Longley-Rice terrain-sensitive prediction method to establish compliance with Section 73.315 (the community coverage rule). A suitable site was located, and on December 4, 2002, consent from the landowner was obtained. The site will be accessible once an access road is constructed. Permission should easily be obtained for such construction, because there are nearby towers on ridges with access roads.
5. Following the receipt of consent from the landowner, engineering exhibits for a minor modification application were prepared with due diligence, and the application was filed on the earliest reasonable date thereafter, bearing PCC File No. BPH-20021210AAP.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and is made in good faith.


Frank McCoy
Frank McCoy

Subscribed and sworn to before me, a notary public for the State of Illinois,
County of Cook, this 5 day of February, 2003.
Lake


Notary Public



CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 5th day of February, 2003, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **“Opposition to Informal Objection”** to the following:

John C. Trent, Esq.
Putbrese, Hunsaker & Trent, P.C.
100 Carpenter Dr., Suite 100
P.O. Box 217
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(Counsel to Petitioner)

John F. Garziglia, **Esq.**
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1401 Eye Street, N.W.
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(Counsel to Georgia-Carolina Radiocasting Company. LLC)

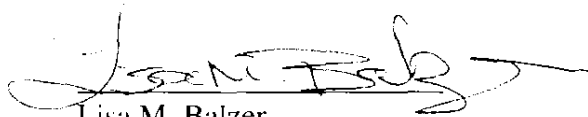
Lisa M. Balzer

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 5th day of February, 2007, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **"Reply"** to the following:

John C. Trent, Esq.
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Lisa M. Balzer